

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022070072

PARENTS ON BEHALF OF STUDENT,

v.

LOS ALAMITOS UNIFIED SCHOOL DISTRICT.

DECISION

November 10, 2022

On June 24, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Los Alamitos Unified School District. On July 21, 2022, OAH granted the parties' request for mediation and for a continuance. Administrative Law Judge Theresa Ravandi conducted this hearing through videoconference on September 13, 14, 15, and 20, 2022.

Attorney Damian Fragoso represented Parents and Student. Parents attended all hearing days on Student's behalf. Attorney Tracy Petznick Johnson represented Los Alamitos. Grace Delk, Los Alamitos' Director of Special Education and Mental Health attended all hearing days on Los Alamitos' behalf.

At the parties' request the matter was continued to October 12, 2022, for written closing briefs. The record was closed, and the matter submitted on October 12, 2022.

ISSUE

Did Los Alamitos deny Student a free appropriate public education for the 2022-2023 school year by failing to offer structured literacy instruction and evidence-based practices for dyslexia appropriate to meet Student's needs in the April 29, and May 13, 2022 individualized education programs?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services

designed to meet their unique needs and prepare them for further education, employment, and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student requested this hearing and bore the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 10 years old and in fifth grade at the time of hearing. Student resided with Parents within Los Alamitos' geographic boundaries at all relevant times. Student last attended Los Alamitos Elementary School during the 2020-2021 school year for third grade. Student attended fourth grade at The Prentice School, a California certified nonpublic school. She remained at Prentice at the time of hearing. Student was eligible for special education under the categories of specific learning disability and speech and language impairment, and also met criteria for other health impairment based on attention deficits.

ISSUE: DID LOS ALAMITOS DENY STUDENT A FAPE FOR THE 2022-2023 SCHOOL YEAR BY FAILING TO OFFER STRUCTURED LITERACY INSTRUCTION AND EVIDENCE-BASED PRACTICES FOR DYSLEXIA APPROPRIATE TO MEET STUDENT'S NEEDS IN THE APRIL 29, AND MAY 13, 2022 IEPs?

Student claims the May 2022 IEP denied her a FAPE because it failed to offer a specific structured literacy program such as Orton-Gillingham or similar evidence-based program. Student argues the current offer was deficient as it allowed staff to pick and choose different approaches to address her dyslexia and lacked the intensity of programming she needed to reach grade level standards. Student contends Los Alamitos' IEP offer for the 2022-2023 school year was not substantially different from its prior IEPs, which had not ameliorated her reading deficits.

Los Alamitos asserts its May 2022 IEP offered a structured literacy program which was evidence-based and reasonably calculated to meet Student's dyslexia-related academic needs and enable her to make appropriate progress.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006); Ed. Code, §§ 56032, 56341, and 56345, subd. (a).)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make

appropriate progress in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000, 197 L.Ed.2d 335] (*Endrew F.*)) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (a) (2006); Ed. Code, § 56031, subd. (a).)

The IEP must describe the child's present levels of academic achievement and functional performance, and include annual goals designed to meet the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(i)(I)&(II); 34 C.F.R. § 300.320(a)(1)(2) (2007); Ed. Code, § 56345, subd. (a)(1)&(2).) The IEP must include a statement of the special education, related services, and supplemental aids and services, based on peer-reviewed research to the extent practicable, and program modifications and accommodations to assist the child to advance toward attaining the goals, make progress in the general education curriculum, and participate in education with peers, with and without disabilities. (20 U.S.C. § 1414 (d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4) (2007); Ed. Code, § 56345, subd. (a)(4).) The IEP must specify a projected date for the beginning of the services and modifications and their anticipated frequency, location, and duration. (20 U.S.C. § 1414 (d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7) (2007); Ed. Code, § 56345, subd. (a)(7).) Nothing in the IDEA requires a district to include additional information in a child's IEP beyond what is explicitly required. (20 U.S.C. § 1414(d)(1)(A)(ii)(I); 34 C.F.R. § 300.320 (d)(1) (2007); Ed. Code, § 56345, subd. (i).)

STUDENT'S DYSLEXIA-RELATED ACADEMIC NEEDS

The undisputed evidence established Student had significant, long-standing reading deficits due to severe dyslexia. Los Alamitos first identified Student as having a

specific learning disability in December 2018. Student showed deficits in memory, phonological processing, and attention, and performed below average in reading and writing.

Student's expert, Dr. Dudley Wiest, licensed clinical and educational psychologist, completed an independent educational evaluation of Student in February 2021. Wiest was well-versed in the field of dyslexia, as a psychology professor since 1993, with more than 25 years of clinical experience. He had also worked many years as a public-school psychologist and teacher.

Wiest comprehensively assessed Student as a third grader. Consistent with Los Alamitos' 2018 evaluation, Wiest found Student to have strong learning potential but also severe weaknesses in memory and phonological processing which form the foundation for reading. Wiest diagnosed Student with a specific learning disability in reading, writing, and math. Student had significant deficits and could not recognize sounds or remember symbols at the time of his evaluation. Wiest opined that Student's reading deficits could be remediated with the right treatment intensity, at the level of breakdown, over a significant time period.

In September 2021, the parties entered into a settlement agreement. Los Alamitos agreed to fund Student's fourth grade year at Prentice, in exchange for Parents' waiver of educational claims through the 2021-2022 school year. The parties agreed Los Alamitos would conduct Student's triennial evaluation and convene an IEP team meeting by May 2022 to make an IEP offer for the 2022-2023 school year. Los Alamitos completed Student's assessment in April 2022 and convened an IEP team

meeting on April 29, and May 13, 2022. Together, these are referred to as the May 2022 IEP. Parents retained the right to challenge the assessments and IEP offer. This hearing addressed one challenge to that IEP offer.

The May 2022 IEP offer was based on a comprehensive multidisciplinary evaluation of Student that was not in dispute at this hearing. As part of the evaluation, school psychologist Danielle Grissom administered standardized cognitive testing. Grissom had served as a school psychologist for eight years, specifically with Los Alamitos since 2016. She knew and was familiar with Student, as she completed Student's 2018 assessment and participated in all of Student's IEP team meetings since first grade.

Consistent with the 2018 evaluation, Grissom identified Student as having cognitive processing deficits in the areas of memory, phonological processing, attention, and executive functioning. Education specialist Martha Chavarin administered Student's academic achievement testing. Chavarin had been an educational specialist with Los Alamitos since 2014. Student scored in the very low range in all areas of reading. Her math and writing scores ranged from low, to low average, with spelling in the very low range. Student's 2022 academic achievement scores declined in all areas as compared to the 2018 results. Grissom determined Student continued to meet eligibility criteria for specific learning disability in the areas of basic reading skills, reading comprehension, written expression, and mathematics reasoning. The test results showed Student's weaknesses were consistent with dyslexia. Grissom concluded Student required structured literacy instruction and evidence-based practices for dyslexia due to her identified deficits, particularly in phonological processing.

THE MAY 2022 IEP: ACADEMIC PRESENT LEVELS AND ANNUAL GOALS

Student did not challenge the present levels of academic achievement or associated annual IEP goals. Accordingly, no findings are made regarding their legal compliance. To determine the appropriateness of Los Alamitos' offer of literacy services, however, an understanding of the goals they were meant to support is needed. Chavarin identified Student's academic needs based on her assessment and Prentice's report of Student's academic functioning. The May 2022 IEP included a statement of Student's present levels of academic performance and offered five goals to address Student's reading and spelling needs.

Student was reading at a mid-first grade level at the time of the May 2022 IEP team meeting. Chavarin developed goals in decoding, letter blends and patterns, reading fluency and comprehension, and spelling to target Student's academic needs. The reading fluency and comprehension goals called for Student to demonstrate proficiency at an instructional level "L" to "M" of the Fountas and Pinnell Benchmark Reading Assessment, the equivalent of a second to mid-second grade reading level.

OFFER OF ACADEMIC SUPPORTS AND SERVICES

To help Student make progress on her academic goals and in the general education curriculum, Los Alamitos offered specialized academic instruction. California law does not specifically define the term "specialized academic instruction," but the understanding of that term in California is that its meaning is the same as the federal term "specially designed instruction." (See California Legislative Analyst, *Overview of Special Education in California*, November 6, 2019, (<https://lao.ca.gov/Publications/Report/4110>).)

Specially designed instruction is defined as adapting the content, methodology, or delivery of instruction to address the unique needs of the student with a disability and to ensure access to the general curriculum so the student can meet the applicable state educational standards that apply to all students equally. (34 C.F.R. § 300.39(b)(3) (2006).) The Education Code describes the duties of a resource specialist, like Chavarin. These include providing IEP instructional services to a pupil, like Student, who has been assigned to regular classroom teachers for a majority of a school day. (Ed. Code, § 56362, subd. (a)(1).)

Chavarin incorporated Prentice's input as well as Wiest's report when making her own recommendation for specialized academic instruction. Los Alamitos' May 2022 IEP offered Student 375 minutes per week of group specialized academic instruction based on Chavarin's recommendation. Student argued the offer was inappropriate because Student needed daily specialized academic instruction, and Los Alamitos failed to specify the type and intensity of instruction. Student's arguments fail.

Chavarin testified at hearing. She thoughtfully considered and thoroughly answered each question, providing persuasive testimony that was not undermined by cross-examination. Chavarin considered Wiest's 2021 report to be a reference point for understanding Student's dyslexia and how to best remediate her reading deficits. However, she noted Wiest's evaluation results were dated, having been obtained more than a year before Los Alamitos' assessment. Wiest determined Student required 60 minutes per day of remediation to re-learn the alphabet, plus 90 minutes daily of English language arts to expose her to grade-level vocabulary, grammar, and semantics. Chavarin did not agree that Student needed to re-learn the alphabet. Based on her assessment and Prentice teacher input, Student had already mastered the alphabet. Her

testimony was more persuasive than Wiest's as she had current information on Student's academic achievement levels. Otherwise, Chavarin generally agreed with Wiest's recommendations.

The IEP is to be read as a whole. There is no requirement that mandatory information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. §1414(d)(1)(A)(ii)(II); 34 C.F.R. § 300.320(d)(2) (2007); Ed. Code, § 56345, subd. (h).) The May 2022 IEP offered Student 375 minutes per week of specialized academic instruction in a group setting as detailed on the services page. It was undisputed Student required remedial literacy instruction throughout the week. The meeting notes page clarified Los Alamitos' specialized academic instruction offer located on the IEP service page. The notes stated that the instruction would be provided each day for 75 minutes. Student offered no legal support for her contention that the notes page is not part of the IEP. The May 2022 IEP, read as a whole, offered Student 75 minutes per day of specialized academic instruction to support her literacy needs. Chavarin established that 75 minutes per day would be ample time to provide required remediation and support Student's literacy goals. The offer exceeded the amount of remedial instruction time recommended by Student's expert and matched the minutes provided at Prentice, Parents' preferred placement. Student did not prove the offer of specialized academic instructional time was insufficient to meet her needs.

Student challenged the IEP for failing to specify the type and intensity of instruction without providing any legal support that this was required content for Student's IEP. Student's contention that the offer failed because it did not specify

what subjects would be targeted or the size of the groups was not persuasive. The specialized instruction was offered to support Student's literacy goals. Further, the IEP is not required to include such details as a description of the size of the group, unless this is required to offer FAPE. Los Alamitos provided remedial academic instruction for students two or more grade levels behind, like Student, in groups of no more than three. Student did not establish this delivery mode denied her FAPE. Further, Student did not allege Los Alamitos failed to make a clear written offer. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) No determination is made in that regard.

Los Alamitos offered a variety of accommodations and modifications, and assistive technology devices and services to support Student in the general education classroom. Grissom and Chavarin established the May 2022 IEP offer of assistive technology and accommodations was consistent with evidence-based practices for dyslexia. To support Student's access to the general education curriculum, Los Alamitos offered 600 minutes per year of consultation time between Student's service providers and the general education teacher. Chavarin agreed this block of time afforded sufficient time for her to modify class assignments and consult with the general education teacher on effective instructional methods. Student did not contend otherwise.

The May 2022 IEP offered a sufficient amount and frequency of specially designed instruction reasonably calculated to meet Student's literacy needs and enable her to make appropriate progress in light of her circumstances.

THE MAY 2022 IEP OFFERED A STRUCTURED LITERACY PROGRAM

It was undisputed that Student required a structured literacy approach to benefit from her specialized academic instruction. Student contended, but did not prove, the May 2022 IEP did not require Los Alamitos to use structured literacy and evidence-based dyslexia practices.

California has outlined specific guidelines for instructing students with dyslexia. Education Code section 56335 describes educational services for students with dyslexia as an evidence-based, multi-sensory, direct, explicit, structured, and sequential approach to instruction. (Ed. Code § 56335, subd. (a).) This section required the Superintendent of Public Instruction to develop program guidelines for identifying, assessing, and educating students with dyslexia, including strategies for remediating dyslexia characteristics, by the start of the 2017-2018 school year. (Ed. Code, § 56335, subds. (a),(b) &(d).) Under this section, the California Department of Education published the California Dyslexia Guidelines in 2017. Education Code section 56335 does not require any additional information be included in the IEP of a student with dyslexia. Indeed, nothing in the law requires a school district to follow these guidelines. At Los Alamitos' request, the California Dyslexia Guidelines were introduced into evidence. Los Alamitos developed its literacy program based on these guidelines.

Although there are many methods with different names that fall under the umbrella of structured literacy, all have common content, or what is taught, and principles of instruction, or how to teach. (*California Dyslexia Guidelines*, Sacramento 2017, last modified December 2018, p. 65 (*Dyslexia Guidelines*)). In his report and at hearing, Wiest explained Student required multisensory remedial instruction - auditory, visual, tactile, and kinesthetic - to activate the responsible brain circuits and help attach

memory. Student needed explicit and sequential instruction by a trained professional in a small group setting, starting with phonological awareness and recognizing sounds before advancing to the next logical step. His testimony in this regard was consistent with Los Alamitos' experts and convincing.

Chavarin readily identified and explained key components of structured literacy, defined terms, and provided practical examples, sharing her expertise. Chavarin explained that "structured" literacy involved identifying the lesson content or scope, based on the student's need, and following a logical sequence from simple to complex. Structured literacy incorporated simultaneous multisensory methods such as tapping out sounds or forming letters with playdough to engage multiple senses. This ensured a mind to body connection to enhance learning. Chavarin was certified in Whole Brain Teaching, a multisensory, brain-based strategy. At hearing, she enthusiastically described the techniques and endorsed the benefit of engaging multiple senses during the learning process. Structured literacy also required progress monitoring where the teacher ensured the student had mastered the content to the degree of automaticity, thereby freeing cognitive resources to move to the next learning step. Through progress monitoring, the teacher identified any need to tailor the instruction to help the student advance to the next step. Wiest conceded that it did not matter which particular structured literacy method was used, or even if different methods were selected from, so long as the program was working and remediating the child's deficits. Wiest acknowledged that he did not know whether or not Los Alamitos had such a program. Wiest had no knowledge of Los Alamitos' May 2022 IEP offer or its literacy program. As such his general critiques were not persuasive.

Los Alamitos informed Parents at the May 2022 IEP team meeting that it followed a structured literacy approach consistent with the California Dyslexia Guidelines. This

was not a new approach, nor the first time Los Alamitos described it to Parents. The year prior, at the April 2021 IEP team meeting, the education specialist informed Parents of evidence-based strategies and programs used during specialized academic instruction. In an April 27, 2021 prior written notice to Parents, Delk wrote,

“As explained at the IEP meeting, the proposed reading interventions would follow a research-based program which is multi-sensory utilizing visual, kinesthetic, and auditory modalities. It follows a structured literacy approach in that the program utilizes a systematic and cumulative method, is explicitly taught, and includes a diagnostic component throughout. The reading intervention supports skill development which includes the areas of phonology, sound symbol association/phonics, orthography, syllables, syntax, and reading comprehension. [Student] would receive integrated instruction from her team of qualified instructors and the recommended reading intervention and minutes are consistent with California’s Dyslexia Guidelines.”

Student contended the May 2022 IEP did not require Los Alamitos to provide structured literacy. The evidence refuted this contention. In her closing brief, Student argued Los Alamitos’ failure to describe the offered literacy instruction in its June 2022 prior written notice, as it had in the April 2021 notice, showed a complete lack of commitment to structured literacy. This ignores the fact that the May 2022 IEP, itself, specifically noted Los Alamitos’ commitment to using structured literacy.

The May 2022 IEP team meeting notes clarified that Los Alamitos was committed to a structured literacy approach. Student offered no legal support for her contention that this commitment to structured literacy was not part of the FAPE offer

because it was included in the IEP notes section. Student's further argument that a commitment to structured literacy was not the same thing as a commitment to providing the evidence-based, direct, sequential, multisensory, cumulative instruction Student required, is not convincing as it evinces a fundamental misunderstanding of what structured literacy is.

Additionally, the May 2022 IEP educational setting page noted,

"[Student] currently requires replacement instruction to meet the outcomes identified in her measurable annual goals. Based on student record review as well as multidisciplinary reports and collaborative discussion for this IEP, it is understood that this instruction will require direct, explicit teaching of skills outside of the general education setting."

Further, Student's reading goals required a structured literacy program. For example, the reading fluency goal required the provision of structured literacy supports. Student's reading decoding, fluency, and comprehension goals referenced the Fountas and Pinnell Benchmark Reading Assessment, itself a structured literacy approach as established by Chavarin. With Fountas and Pinnell, a student reads increasingly difficult lists of six words. Once they missed three of the words, that identified the suggested reading level. The student would read a text at the suggested level and the teacher would review accuracy and comprehension to determine their independent and instructional reading levels. Through a process of review and progress monitoring, students systematically moved up through the levels to more difficult text.

Chavarin testified there was no doubt that the May 2022 IEP offered Student a structured literacy program based on the IEP team discussions and the notes, and because there was no other way to teach Student with her level of reading deficits.

Chavarin's testimony was sincere, consistent with the evidence, and persuasive. Chavarin established that specialized academic instruction at Student's required level of remediation, as determined by the triennial assessment and outlined in the annual reading and phonics goals, could only be delivered in a structured, systematic, multisensory manner which is structured literacy. Her testimony was uncontroverted. At hearing, Chavarin provided dynamic examples of structured literacy techniques she used, leaving no question as to what her literacy instruction looked like. There was no evidence Student asked Los Alamitos to describe its structured literacy instruction at the May 2022 IEP team meeting. Rather, Student wanted to know the name of the curriculum Los Alamitos would use.

Student's expert was not familiar with the May 2022 IEP and did not challenge its content. Any concern that Los Alamitos would not be able to deliver on its commitment to a structured literacy program was speculative.

Student required structured literacy and the May 2022 IEP offered this. Student specifically challenged the substance of the offered literacy services. As clarified at the prehearing conference and at hearing, Student did not identify as an issue for hearing the clarity of the written offer, and as previously stated, no such determination is made here.

LOS ALAMITOS' STRUCTURED LITERACY PROGRAM

Parent was a caring, diligent advocate for Student, understandably concerned that Student remained significantly below grade level in reading. On May 24, 2022, Parents provided Los Alamitos a 10-day notice of unilateral placement at Prentice. They intended to place Student at Prentice and seek reimbursement because Los Alamitos

failed to offer a program they believed sufficient to address Student's substantial learning disability in reading. They noted that Prentice was a campus devoted to educating students with learning disabilities and provided integrated and experienced instruction in research-based methods proven effective. It was Parent's understanding that Student was making good progress at Prentice and unlearning poor strategies that had impeded her learning.

At the time of the May 2022 IEP team meeting, it was clear Parents preferred the Orton-Gillingham method Prentice used and wished to maintain continuity for Student. To determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not that preferred by the parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 citing *Rowley, supra*, 458 U.S. 176, 207 [The IDEA does not provide for an "education ... designed according to the parent's desires,"]). A parent's preferred placement, even if better for the child, does not necessarily mean the placement proposed by a school district is inappropriate. (*Gregory K., supra*, 811 F.2d 1307, 1314.)

The starting point of a FAPE analysis is Los Alamitos' offered program. This program largely comported with that recommended by Student's expert. Overall, Chavarin agreed with Wiest's recommendations, noting that most of them were already part of Los Alamitos' programming. For example, her small group remedial instruction resembled Wiest's description of what Student required, namely, a standardized, multisensory approach by a trained clinician using direct instruction, and a logical and explicit sequence from simple to complex. Los Alamitos delivered its structured literacy program in small groups of no more than five students. For students two or more grade

levels behind, like Student, the groups were smaller, with no more than three students. Furthermore, Wiest's recommendation that Student be exposed to grade level reading and writing for 90 minutes per day coincided with Los Alamitos' 90-minute block of English language arts which would afford Student a rich learning experience with fifth grade peers.

Chavarin was well-versed and trained in using Los Alamitos' evidence-based signature practices in literacy. Los Alamitos instituted a mandatory five-year training program of best practices in reading and math instruction. All of its teachers participated in the program and were observed and coached as they learned and implemented teaching principles. Chavarin explained that "The Reading Foundations for Common Core," was one example of Los Alamitos' signature practices based on the California Dyslexia Guidelines. Teachers learned to provide explicit, systematic, cumulative, and diagnostic instruction to address the literacy components of

- phonology,
- sound symbols,
- syllables,
- morphology,
- syntax, and
- semantics.

Chavarin had used structured literacy in her remedial and supplemental specialized academic instruction at Los Alamitos for many years. She had been trained in and used both the Lindamood-Bell and Orton-Gillingham methods. Chavarin would have been Student's special education teacher had Student returned to Los Alamitos Elementary.

Los Alamitos followed the California Dyslexia Guidelines which defined the components for an evidence-based structured literacy program. The progress monitoring element of structured literacy included individualizing instruction based on careful, continuous assessment. (*Dyslexia Guidelines*, p.66.) Structured literacy required teachers to tailor instruction to the individual needs of the struggling reader. (*Id.*, at 68.)

STUDENT DID NOT REQUIRE A SPECIFIC METHODOLOGY

Parent was critical of the May 2022 IEP offer of specialized academic instruction as it failed to identify any specific reading methodology. However, an IEP is not required to include the specific instructional methodologies the school district will use to educate the child. (*C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122 (*C.P.*); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) Rather, the "IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide educational benefit." (*Ibid.*; see *Rowley, supra*, 458 U.S. 176, 206 and 208 [questions of educational policy and methodology left to school authorities].)

School districts need not specify an instructional method in the IEP unless that method is necessary for a student to receive a FAPE. (71 Fed. Reg. 46,665 (Aug. 14, 2006); *Crofts v. Issaquah School Dist. No. 411* (9th Cir. 2022) 22 F.4th 1048, 1056 (*Crofts*) citing *J.L. v. Mercer Island School Dist.*, (9th Cir. 2010) 592 F.3d 938, 945 fn.5 [districts are "entitled to deference in deciding what programming is appropriate as a matter of educational policy."].) In *Crofts*, the Ninth Circuit recently held the school district was not required to include the Orton-Gillingham method in a student's IEP as the student failed to demonstrate this method was necessary to provide FAPE. (*Crofts, supra*, 22 F.4th 1048, 1056-1057.) The Ninth Circuit explained, that for a district to meet its substantive

obligations, it must provide an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” (*Id.* citing *Endrew F.*, *supra*, 137 S.Ct. 988,1001.) Student’s attempt to distinguish *Crofts* was unconvincing. The fact that Parents were not asking Los Alamitos to offer Orton-Gillingham per se, but rather asking it to identify at least one method in Student’s IEP, does not change the equation. Student had the burden of proving she required this specificity to receive a FAPE. Student did not meet her burden.

Rogich v. Clark County School Dist. (D. Nev., Oct. 12, 2021, No. 217CV01541RFBNJK) 2021 WL 4781515, at *7, presented what that court called “one of those rare circumstances” where the student’s needs required a certain methodology. Notably, the court determined, “This is not to say that [student] necessarily required the Orton-Gillingham methodology, but she did require an equivalent methodology that was a) research-based, b) systemic, c) cumulative, and d) rigorously implemented.” (*Ibid.*) Here, Los Alamitos committed to providing just that. The *Rogich* court found the school district failed to explain the program it would offer in lieu of Orton-Gillingham; that it did not have any equivalent program; its representation to the contrary were illusory; and that it did not have the requisite knowledge to properly identify or develop a program. (*Ibid.*) In contrast, Los Alamitos identified its structured literacy program and explained to Parents why it would not commit to one curriculum. Its program was based on the California Dyslexia Guidelines and, therefore, encompassed all the components of structured literacy. Furthermore, its staff were well-versed and experienced in, and committed to using, structured literacy.

Chavarin used the Orton-Gillingham approach at the time of the May 2022 IEP team meeting. However, Los Alamitos did not specify a particular methodology on Student’s IEP because Student’s needs would drive the method. Based on Prentice’s

report of Student's present levels and Los Alamitos' assessment, Student's reading level in May 2022 was the same as when she left Los Alamitos' programing in June 2021, despite nearly one year of Orton-Gillingham instruction. As such, it was reasonable for Los Alamitos to decline Parents' request to specify Orton-Gillingham or even an Orton-Gillingham-based approach as the required method in the May 2022 IEP offer. Student did not meet her burden of proving the May 2022 IEP denied her a FAPE by failing to offer a specific evidence-based structured literacy method, such as Orton-Gillingham.

ECLECTIC APPROACH APPROPRIATE

Student contended, but did not prove, Los Alamitos' eclectic approach to literacy was at odds with implementing an evidence-based program with fidelity. Los Alamitos' education specialists had several evidence-based methods they were trained in and could choose from to teach foundational reading skills that Student needed to learn. Chavarin convincingly reconciled the apparent discrepancy between implementing an evidence-based method with fidelity, and using different methods. Chavarin explained she would select and implement one method while teaching a particular literacy component. If the student was unable to master the content to the level of automaticity with the chosen method, Chavarin would select a different approach. Once the student mastered the element, Chavarin would determine, based on the student's needs and the next goal post, whether to continue with the same method or implement a different method to teach the next component, and so on. In this manner, the teacher implemented a chosen method with fidelity for each instructional unit. Requiring a particular method would limit this autonomy and flexibility in tailoring instruction to Student's needs.

Wiest conceded that an eclectic approach to remediation, or drawing from different reading methods, could be just as effective as implementing Orton-Gillingham. What was key was the evaluative part or making sure the approach was working. Wiest's testimony further distinguished Student's case from that presented in *Rogich*. In *Rogich*, student evaluators specifically noted that using only some Orton-Gillingham methods and mixing them with other program methods was "precisely the type of mixing of methodologies that ... would confuse and impede" the student. (*Rogich*, 2021 WL 4781515, at *7.) Here, no such evidence was presented. Los Alamitos' approach of allowing its education specialists to select from various methodologies did not render its literacy program non-evidence-based or make it any less structured, sequential, cumulative, multisensory, or diagnostic.

Parent's fundamental concern was that Student had not been able to "catch up" and read at grade level. In Wiest's opinion, a structured literacy program was effective if it enabled the child to catch up and narrow the gap with same-aged peers. Wiest opined that making progress was not sufficient. However, the IDEA does not require Los Alamitos to ensure Student achieved any particular outcome. (*Andrew F.*, *supra*, 137 S.Ct. 988, 998 citing *Rowley*, *supra*, 458 U.S. 176, 192.) School districts are not required to maximize the potential of a student with a disability but must offer a program reasonably calculated to enable a student to make appropriate progress in light of their circumstances. (*Rowley*, *supra*, 458 U.S. 176, 200; *Andrew F.*, *supra*, 137 S.Ct. 988, 1001.) That Student did not meet grade-level standards under Los Alamitos' programming is not determinative. (*Crofts*, *supra*, 22 F.4th 1048, 1057.) The IDEA does not require that students with special education services "perform on par" with their general education peers. (*Ibid.* citing *Andrew F.*, *supra*, 137 S. Ct. 988,1001.)

Student did not prove the May 2022 IEP was substantively deficient for failing to specify a particular reading methodology. Further, Student did not establish that Los Alamitos' literacy program failed to comport with evidence-based practices appropriate to meet her dyslexia needs.

THE SONDAY SYSTEM

The May 2022 IEP offered a program for the 2022-2023 school year. Its appropriateness is determined as of the time it was developed, based on information known to the IEP team members, including Parents. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). In July 2022, Los Alamitos' Governing Board adopted the Sonday System as a structured literacy program for its special education students. Sonday is an Orton-Gillingham approach. All education specialists at Los Alamitos Elementary had been trained on Sonday and provided the program materials as of the time of hearing. Chavarin completed her training by the beginning of September 2022.

A school district's actions "cannot be judged exclusively in hindsight," (*Adams, supra*, 195 F.3d 1141, 1149 citing *Fuhrmann v. Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) However, the Ninth Circuit has observed, "after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006.) Subsequent adoption of the Sonday System cannot be used to judge the adequacy of the May 2022 IEP offer of literacy services. However, this evidence sheds light on the reasonableness of Los Alamitos' refusal to specify a particular instructional method and the efficacy of its literacy program.

While the Souday program, in name, was new to Los Alamitos, the teaching principles and content were not. Los Alamitos had been implementing the same structured literacy principles for many years. Chavarin was familiar with Souday's tools and techniques, though they were presented in a different package. Adopting the Souday System was a continuation of what Los Alamitos had been doing to provide structured literacy to its students. In an August 29, 2022 prior written notice, Los Alamitos informed Parents that despite its adoption of the Souday System, it would continue to use a variety of methods to assess Student's reading progress and individualize instruction as needed.

INTERRUPTED PROGRESS UNDER DISTRICT PROGRAMMING

Student argued the May 2022 IEP offer of structured literacy was not appropriate to meet her needs because it was substantially similar to past IEPs which failed to result in appropriate progress. A review of Student's IEPs reveals a pattern of interrupted progress and increased instructional time.

Student was reading at a Fountas and Pinnell level C by the end of kindergarten. Los Alamitos noted what it termed a "summer slide" where Student lost skills over the summer break. Student started first grade at a reading level A. By October 2018, Student was back to reading level "C" and able to read up to five high frequency kindergarten words. In December 2018, Student first received specialized academic instruction as an IEP service, in the amount of 180 minutes per week. Student finished first grade at reading level E, and could read 42 of 55 kindergarten sight words. Student's reading skills improved during first grade.

Student again experienced summer regression, starting second grade at reading level C, and only reading 25 of 55 kindergarten sight words. In response, Los Alamitos increased Student's group specialized academic instruction to 260 weekly minutes at the beginning of the 2019-2020 school year. At the December 2019 annual IEP, Student was still recouping past skills, reading at level D, and able to read 50 of 55 kindergarten and 52 of 100 first grade sight words. She met two of three reading goals, and partially met one reading goal and two writing goals. Los Alamitos increased its offer of specialized academic instruction to 300 weekly minutes and added 60 minutes per month of consultation services. Student's annual second grade IEP was implemented for less than three months before the March 2020 COVID-19 school shutdown.

Student participated in distance learning for all of third grade, the 2020-2021 school year. She stopped attending reading lab, an intervention she had participated in for two years. At the November 2020 IEP team meeting, Student was reading at level F though she was recouping phonics skills she possessed pre-pandemic in February 2020. Student met one of four academic goals, namely reading comprehension. The team developed two reading goals targeting decoding and comprehension of mid-second grade level text, and writing and language expression goals. Los Alamitos increased its offer of specialized academic instruction to 330 minutes. Parents did not consent to this IEP, so Student's level of instruction remained at 300 weekly minutes.

Student required much Parent support during distance learning. In February 2021, Los Alamitos agreed to provide 120 minutes of Student's specialized academic instruction individually to target writing during distance learning. Los Alamitos also offered Student in-person specialized academic instruction even while she remained in the distance learning program. Parents declined. Student left Los Alamitos' programming in June 2021.

The May 2022 IEP offered Student an additional 75 minutes per week of specialized academic instruction as compared to her last implemented program at Los Alamitos. Student argues her lower academic achievement scores and continued first grade reading level in May 2022 proved Los Alamitos' literacy approach had not been and would not be effective. Student's argument was not persuasive as it failed to account for important intervening variables, namely summer and COVID-19 regression, and the impact of distance learning and a year at Prentice.

Student did not identify as an issue for hearing whether Los Alamitos denied her a FAPE by failing to offer extended school year services. Regardless, the parties resolved claims through the 2022 summer period by way of a separate settlement agreement. Further, the May 2022 IEP was intended to be operative until April 28, 2023, the end date for goals and services. Los Alamitos had the right and responsibility to develop a new annual IEP covering extended school year 2023.

INTERVENING VARIABLE: IMPACT OF COVID-19

Wiest was critical of Los Alamitos' literacy program given Student's poor reading abilities after several years of its programming. However, he failed to account for the impact of the COVID-19 shutdown and distance learning on Student's level of functioning. Wiest evaluated Student approximately one year after Governor Newsom declared a state of emergency due to the COVID-19 pandemic. In accordance with the Governor's executive order and public health requirements, Los Alamitos closed its schools beginning March 16, 2020, through the remainder of the 2019-2020 school year. One week after the start of the 2020-2021 school year, Los Alamitos obtained an elementary school waiver and was able to welcome students back to campus. For the 2020-2021 school year, Los Alamitos offered a hybrid model of in-class and remote

instruction. Parents chose to keep Student home full time, and enrolled her in Los AI@HOME, the distance learning option. Wiest's February 2021 evaluation and home observation of Student occurred after she had spent nearly one full year in distance learning through virtual platforms. He expressly noted in his report that Student "continued to regress."

During his evaluation, Wiest observed Student at home participating in a Zoom general education English class. Wiest obtained teacher input and summarized their concerns in his report. Student's special education teacher noted remote instruction was detrimental to Student's learning. The teacher reported Student was

- less able to write independently since distance learning,
- more oppositional,
- less able to persevere,
- had lower frustration tolerance, and
- more readily escaped tasks in the virtual classroom.

Grissom had observed Student in class at Los Alamitos Elementary, at home during distance learning, and at Prentice. She also noted Student was less engaged, with higher distractibility and lower frustration tolerance during distance learning. In his report, Wiest recommended that Student return to in-person instruction given the research showing the detrimental impact of COVID-19 and school shut-downs on learning. Similarly, at hearing, Wiest agreed that virtual learning had not been conducive to effective remediation. Even so, his criticism that Student failed to advance because of Los Alamitos' deficient programming did not account for the adverse impact

of more than one year of Zoom instruction on Student's learning. Rather, Wiest placed full blame on Los Alamitos for failing to provide an effective reading program. This rendered his critique less persuasive.

Grace Delk had been employed with Los Alamitos since 2014, as a school psychologist, coordinator, and then director of special education since 2019. Delk candidly testified many students regressed during the pandemic as they adjusted to distance learning and received less instructional time. The evidence showed Student regressed during the COVID-19 shutdown and distance learning. Delk credibly established Student's regression could not fairly be attributed solely to Los Alamitos' structured literacy approach in the 2020-2021 school year.

INTERVENING VARIABLE: YEAR AT PRENTICE

Wiest spoke highly of Prentice, noting it re-vamped its literacy program several years prior and adopted the Orton-Gillingham method. He described it as a program to model. Wiest had not seen Student since February 2021. He knew she completed fourth grade, the 2021-2022 school year at Prentice. Even so, at hearing, he stood behind his April 2021 recommendation that Student required 60 minutes a day of remedial instruction to re-learn the alphabet and reading code. By implication, Wiest did not credit Prentice with having any favorable impact on Student's literacy skills after more than a year of Orton-Gillingham instruction in its model program. In fact, the evidence showed Student did not make measurable academic progress at Prentice over the 2021-2022 school year.

After nearly one year at Prentice, Student did little more than recoup some basic skills lost during distance learning. Los Alamitos' last Student progress report in January

2021 noted she was reading at a mid-first grade level. Student remained at this level more than a year later in April of 2022 based on Prentice's report. Los Alamitos' November 2020 annual goals called for Student to read at a mid-second grade level with 96 percent accuracy by November 2021. Student's May 2022 IEP reading goals targeted this same mid-second grade level to be achieved by April 2023. Additionally, Student's April 2022 academic achievement scores were lower in most areas compared to Wiest's 2021 assessment results.

The conclusion that Los Alamitos' offer of specialized academic instruction was reasonably calculated to enable Student to make appropriate progress in light of her circumstances was reinforced by Student's subsequent pace of progress at Prentice in the 2021-2022 school year. Student did not demonstrate that Los Alamitos' program of special education was inadequate, even in comparison to Parents' preferred program, because the program Parents selected, and Wiest endorsed, failed to deliver Student gains at any greater rate than she experienced through Los Alamitos' special education services.

Wiest was an experienced evaluator, but his knowledge of Student was dated. He had no information on her current levels of performance, Los Alamitos' IEP offer for the 2022-2023 school year, or its structured literacy program. As such, Wiest was unable to provide a credible substantive critique of the May 2022 offer at issue in this hearing, or whether Los Alamitos' structured literacy program was appropriate for Student. Furthermore, despite his protestation to the contrary, Wiest evinced a bias against public schooling. Wiest spoke disparagingly of Los Alamitos' literacy program, referring to it as a "potpourri" it cobbled together, and which proved ineffective as it did not follow the research or make a serious attempt to remediate. Wiest's opinion was groundless as he conceded he had no knowledge of Los Alamitos' program, had never

observed Student's specialized academic instruction, and never interviewed her teachers. Wiest speculated that public school resource teachers would not be capable of providing, or motivated to provide, the intense remediation Student required given the number of students they needed to serve. The evidence did not support his opinion. For all of these reasons, Wiest's critique of Los Alamitos' ability to meet Student's dyslexia needs was not afforded any weight.

Parents' concern that their child was in the fifth grade and still having difficulty with basic reading and writing was legitimate and understandable. However, Student did not meet her burden of proving Los Alamitos denied her a FAPE because its May 2022 IEP failed to offer structured literacy instruction and evidence-based practices for dyslexia appropriate to meet her needs. Student is not entitled to any remedy.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE:

Los Alamitos' April 29, and May 13, 2022 IEP offered structured literacy instruction and evidence-based practices for dyslexia appropriate to meet Student's needs.

Los Alamitos prevailed on the sole Issue.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Under Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings